IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

C.R.No.657 of 2002

Date of Decision : 06.11.2007

Satbir Singh .....Petitioner

versus

Heera Lal and another .....Respondents

CORAM : HON'BLE MR.JUSTICE HEMANT GUPTA

Present : Mr.Rakesh Nehra, Advocate for the petitioner.
Mr.Kulvir Narwal and Mr.Saurabh Dalal, Advocates
for the respondents.

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JUDGMENT

HEMANT GUPTA, J.

The plaintiff-decree holder filed a suit for partition of the joint property on 11.3.1998. The suit was decreed and the plaintiff; defendant Nos.1 to 4 and defendant No.5 & 6 were found entitled to 1/6th share each in the suit property vide judgment and decree dated 5.4.1994.

In an application for appointment of Local Commissioner, so as to prepare a final decree, the objections were filed by the respondent Heera Lal. The objections were though in the preliminary decree the plaintiff was declared entitled to the extent of 1/6th share in the suit property, but now the plaintiff claims 3/4th share. It was contended that such share could not be claimed by the decree holder without getting the preliminary decree modified. It may be noticed that the petitioner claimed ownership in respect of the share of his sisters on the basis of consent decree suffered by them in his favour. Such objections were dismissed by the learned Executing Court on 31.8.1999 and the plaintiff was found entitled to claim 3/4th share in the suit property.

It may be noticed that in the intervening time, the objector Heera Lal has effected sale of his share of the property in favour of Smt.Savitri-respondent No.2 on 26.2.1997. An application filed by the plaintiff-decree holder to implead the transferee as party in the proceedings for preparation of the final decree was earlier declined by the learned trial Court on 5.2.2000. But later on during the proceedings, the learned trial Court found that the presence of Smt.Savitri would be necessary as the petitioner has filed an objection under Section 4 of the Partition Act, 1893 and that the relief in terms of Section 4 of the Partition Act cannot be granted without hearing the transferee, she was ordered to be impleaded. After considering the stand of the transferee i.e. Smt.Savitri-respondent No.2, the learned trial Court dismissed the application filed by the petitioner to purchase the share of the transferee i.e. respondent No.2 as it was found that there is no way to compel the respondent No.2-Smt.Savitri for taking the consideration amount for the property which was purchased by her from Heera. The said order is subject matter of challenge in the present revision petition.

Section 4 of the Partition Act, 1893 (hereinafter referred to as the Act) contemplates that where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a share holder undertakes to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to the willing members of the family.

Learned counsel for the petitioner has vehemently argued on the strength of Section 4 of the Act that since respondent No.2 is purchaser of a dwelling house belongs to undivided family, therefore, the petitioner has a right to buy such share on payment of sale consideration on which the respondent No.2 has purchased the property. It is contended that right of petitioner to purchase the property is in terms of Section 44 of the Transfer of Properties Act, 1882 (hereinafter referred to as the 'TP Act') and Section 4 of the Act. Reliance is placed on the Hon'ble Supreme Court judgment reported as ***"Ghantesher Ghose Versus Madan Mohan Ghose and others, 1996 (11) S.C.C.446".*** On the other hand, learned counsel for the respondent has argued that neither Section 44 of the TP Act nor Section 4 of the Act is applicable in the facts of the present case in as much as the transferee has not sought the partition. It is only in the event of transferee suing for partition, the other co-sharer gets an opportunity to purchase the property. It was pointed out that the principles laid down in Ghantesher Ghose case (supra), are not applicable in the present case as in the aforesaid case, it was the transferee who has sought partition. Reference is made to ***"Gautam Paul Versus Debi Rani Paul and others, 2000 (8) Supreme Court Cases-330"*** and another judgment reported as ***"Babu Lal Versus Habibnoor Khan (dead) by LRs. and others, JT 2000 (5) SC-365".***

Having heard learned counsel for the parties at some length, I do not find any merit in the arguments raised by learned counsel for the petitioner. The right of pre-emption so as to pre-empt the sale in respect of dwelling house, effected by a co-sharer in favour of a stranger is conferred under Section 44 of the TP Act. Such right has been further crystallized

under Section 4 of the Act. Though the provisions of Section 44 of the TP Act are not applicable in the States of Punjab and Haryana, but still the provisions of the TP Act, which are in consonance of the principles of natural justice, good conscious, can be made applicable. Section 44 of the TP Act reads as under:-

> "44. Transfer by one co-owner:- Whether one of two or more co-owners of the immovable property legally competent in that behalf transfers his share or such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.
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> Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

Later, Partition Act, 1893 was enacted with the following statement of Objects and Reasons:-

> "It is also proposed in the Bill to give the Court the power of compelling a stranger, who has acquired by purchase a share in a family dwelling house when he seeks for a partition, to sell his share to the members of the family who are the owners of the rest of the house at a valuation to be

> determined by the Court. This provision is only an extension of the privilege given to such share holders by Section 44, paragraph 2 of the Transfer of Property Act, and is an application of a well-known rule which obtains among Mohammedans every where and by custom also among Hindus in some parts of the country."

Section 4 of the Partition Act, 1893 reads as under:-

> "4. **Partition suit by transferee of share in dwelling house:** (1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a share holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share holder, and may give all necessary and proper directions in that behalf.
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> (2) If in any case described in sub-section (1) two or more members of the family being such share holders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

In Ghantesher Ghose's case (supra), the Hon'ble Supreme Court has culled down the condition which must be satisfied before Section 4 of the Act, can be made applicable. Followings are the said conditions:-

1) A co-owner having undivided share in the family dwelling house should effect transfer of his

undivided interest therein;

2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;

3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the concerned co-owner;

4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and

5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the Court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house."

In the present case, condition Nos.1, 2 & 4 can be said to be satisfied, but it is condition No.3 which is subject matter of controversy in the present petition. According to the petitioner, it is not necessary that the

purchaser has to initiate action for partition so as to make applicable condition No.3 as well. In a suit for partition, the preliminary decree for partition is deemed to have been passed in favour of the defendants as any of the parties in a suit for partition is entitled to enforce his right of separate possession. Therefore, the transferee having purchased the share of the suit property after preliminary decree was granted, is also suing for partition and thus in terms of Section 4 of the Act, the petitioner is entitled to pre-empt such share. It was contended that in Ghantesher Ghose's case (supra), it has been held that any legal action taken by anyone for getting redressal from a Law Court, and for vindicating his legal right on which such action is based, can be said to have sued in a Court of law. Thus, respondent No.2 shall be deemed to have sued in a Court of law.

I do not find any merit in the said contention of the petitioner. In Ghantesher Ghose's case (Supra), after the preliminary decree was granted in favour of Smt.Radha Rani, she executed a registered Deed of Gift in favour of her brother. On the basis of Gift Deed, the donee, a stranger to the joint family, filed execution application. Thus, in those circumstances, the Court said that Section 4 of the Act would be applicable even during the course of execution proceedings and when transferee has sued for partition. The judgment in Ghantesher Ghose's case (supra) requires to be examined keeping in view the said factual background.

In Radha Rani's case, Ghantesher Ghose's case was followed and the judgment of ***"Alekha Mantri Versus Jagabandhu Mantri and otherse, AIR 1971 Orissa-127"*** was reversed. In ***Babu Lal's case (supra),*** the facts are practically para materia as in the present case. The decree holder after getting the final decree has moved an application under Section

4 of the Act. The appellant before the Hon'ble Supreme Court, who was a stranger purchaser, has not filed any application for separating his share from the dwelling house either on such a preliminary decree or the final decree or even thereafter in execution proceedings. The Court found that it cannot be said that the transferee stranger, purchaser of a co-owner interest in the joint property, was suing for partition either as a plaintiff or even as a defendant in the suit for partition. Still later, in Gautam Paul's case (supra), the issue raised in the present petition was examined in extenso by the Hon'ble Supreme Court. The argument before the Hon'ble Supreme Court was that in a suit for partition, the position of all the parties is inter changeable. Separate allotment can be claimed by any party irrespective of the fact whether he was the plaintiff or defendant. It was argued that if a stranger is defendant in a suit for partition, then irrespective of whether he asks for a separate allotment or not, any co-sharer can claim a right for pre-emption under Section 4 of the Act. Such argument did not find favour with the view of the Hon'ble Supreme Court and the views of the Calcutta, Patna and Orissa High Courts were found to be not correct. It was held to the following effect:-

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> There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus, strangers/outsiders can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that the transferee of a share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against

> intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case Section 4 of the Partition Act comes into play. Except for Section 4 of the Partition Act, there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus, before the right of pre-emption, under Section 4 is exercised the conditions laid down therein have to be complied with. *As seen above, one of the conditions is that the outsider must sue for partition (Emphasis supplied).* Section 4 does not provide the co-sharer a right to pre-empt where the stranger/outsider does nothing after purchasing the share. In other words, Section 4 is not giving a right to a co-sharer to pre-empt and purchase the share sold to an outsider anytime he/she wants."

The said judgment is complete answer to the argument raised by the learned counsel for the petitioner. It has been held that Section 4 does not provide a right to pre-empt to a co-sharer where the stranger/outsider does nothing after purchasing the share. Similarly, in the present case, respondent No.2 has not taken any steps for partition of the dwelling house. It is the petitioner who filed a suit for partition and in which the preliminary decree was passed. It is the petitioner who initiated the proceedings for preparation of final decree. The transferee has not even moved an application for becoming party in execution proceedings. Thus, it cannot be said that such transferee has sued for partition. If the transferee has not sued for partition, the petitioner cannot seek his pre-emptory right to purchase

under Section 4 of the Act. The remedy of the petitioner is to seek partition by metes and bounds in terms of other provisions of the Act.

Consequently, I do not find any illegality or irregularity in the order passed by the learned trial Court which may warrant interference of this Court in exercise of its revisional jurisdiction.

The revision petition stands dismissed.

06-11-2007 **(HEMANT GUPTA)**
mohinder* **JUDGE